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MALABAR AND LEGISLATIVE EXPERIMENTS.

I.

Malabar in more senses than one is the land of *Anacharams* or anomalies and offers a congenial field for reformers legal and social, good and bad. The Malayalis educated in an atmosphere antipathetic to the institutions of Malabar are naturally dissatisfied with them and their grievances find a ready response in people outside, specially as it implies an unconscious compliment to their own institutions. The dissatisfaction felt is so keen that, as we shall show presently, any change however ill-considered or unsatisfactory is felt to be better than no change at all. The dissatisfaction is not confined to British Malabar ; it is equally strong in the adjoining States of Travancore and Cochin, and has already found expression and relief in considerable pieces of legislation in those States. The Travancore and Cochin Nair Regulations are instances of such. The Travancore Regulation is, in the main, conservative and makes very few changes. The Cochin Regulation, on the other hand, is thorough-going and effects some radical changes. Agrarian discontent which is partly the result of the social anomalies of impartible joint holdings has been sought to be remedied in those States by the Travancore Jenmi and Kudiyan Regulation and the Cochin Tenancy Regulation. The Malabar Marriage Act and the Malabar Wills Act and the Malabar Tenants' Compensation for Improvements Act are the British counterparts to the legislation of those States. Registration under the Malabar Marriage Act being voluntary, the Act has been largely ineffective and the Wills Act is more or less declaratory. There is no legislation so far dealing with the other portions of family law and the Malabar Tenants' Compensation Act does not cover the entire ground of the legislation in the States of Cochin and Travancore. The deficiency is sought to be made up by two pieces of contemplated legislation, the Tarwad

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Management Bill of Mr. Thampan and the Malabar Tenancy Bill of Mr. Krishnan Nair. It shall be our endeavour to consider these two Bills in the course of this and the next article.

In this article we shall deal with the reforms sought to be effected in the family law of Malayalis. The features of that law which are felt to be unsatisfactory are : (1) absence of legal marriage and non-recognition of the claims of wives and children, (2) irregular sexual unions between different castes, and (3) impartible joint holdings with imperfect distribution of the benefits flowing from them, the excessive power and opportunities for enjoyment of the karnavan and the comparatively imperfect scope for enjoyment for the junior members. The Travancore Nair Regulation proceeds somewhat on old lines. It regularises the customary union known as *Sambandham* whether between Nairs only or between Nairs and non-Nairs and gives the wife and children right of maintenance ; in the case of Nair males, it gives rights of intestate succession to half of the separate and self-acquired property in competition with the family and in the absence of such, to the whole of it. It preserves the absolute right of dissolution at will possessed by either spouse, but subject in the case of husband, to liability to make reasonable compensation and in the case of both to the necessity of bringing a suit and having a formal decree dissolving the marriage or having a registered document recording a divorce by mutual consent. In the case of non-Nair males, the right of the Nair wife and children is confined to mere rights of maintenance. In the case of *Putravakasam* property the Regulation raises the presumption of tenancy-in-common with right of partition *per capita*. It recognises rights of testamentary disposition in respect of separate and self-acquired property. As regards karnavan's powers of alienation, representation in suits and incurring debts, the Regulation does introduce considerable innovations, but they are mostly in the nature of providing additional guarantees such as writing, and joinder of senior anandravans. Under the law as understood in Travancore, in the case of sales, leases and mortgages with possession for over 12 years, consent of major members was necessary for their validity. The Regulation adds that the consent must appear in writing. In the case of mortgages with possession for 12 years and less also, similarly, consent was necessary but the Regulation says that that consent may be presumed from the written consent of the senior anandravans of each tavazhi.

In other cases of alienation and debts by the karnavan the presumption used to be that they were binding. The Regulation substitutes instead the rule that in order to be binding the alienation must have been made or the debt incurred alleging necessity and the creditor or alienee must have made *bona fide* inquiries. In the case of decrees, no decree is to be binding unless the karnavan is sued as such and the senior anandravans of all the tavazhis are parties. Like many other enactments dealing with similar topics, this one bears marks of want of due consideration. It is too comprehensive to be regarded as a mere amending Act but is not at the same time sufficiently comprehensive to be regarded as a consolidating Act. The result is utter confusion. The rule as to sales runs as if written consent of all the majors is all that is necessary to validate them, especially having regard to the next section which requires both consent and necessity. But that obviously could not have been the intention. And again, no provision is made for cases where any junior member capriciously dissents or is obstructive. The Cochin Regulation supplies this defect by adding the indefinite expression "wherever possible." Again, the Regulation makes no distinction between moveables and immoveables though the distinction must have been very familiar. In fact the Travancore decisions recognised the absolute power of the karnavan to deal with moveables unlike in the case of immoveables where he had to take the consent of the anandravans. In the case of good many moveables, in the ordinary course of management they have got to be sold ; for instance paddy or fruits gathered from the land or realised as rent. This is recognised in the Cochin Regulation which exempts these from the general rule. But, by making vessels, jewels or all other things except usufructs or grain rent subject to the rule, they make it impossible for the karnavan to so much as substitute a new vessel or furniture by selling an old and useless one without the written consent of his juniors. Before the enactment in question, Courts used to presume the consent of all the members of the family from the consent of the senior anandravan. The Statute adds to it the further precaution of the consent of the senior anandravans of every tavazhi. The Regulation requires both for delegation and renunciation by the karnavan, registered documents.

The Cochin Regulation proceeds on the basis of the Travancore Regulation but is more ambitious. It

imposes the condition of monogamy and in all cases of *sambandham* whether with Nairs or non-Nairs, it confers rights of succession on the widow and the issue. The legislators looked at the question apparently so much from the point of view of Nairs that all unconsciously a discrimination in favour of the Nair spouse and children would seem to have crept in. It is provided that in all cases the widow or children are entitled to 1|2 of the non-Nair husband's self-acquired and separate property. Suppose a non-Nair, governed by Hindu Law had only self-acquired property and had two sons by his caste wife, and one son by his Nair wife. Under this rule, the two sons by the caste wife will take half and that when no corresponding right of succession to his Nair son is reserved in favour of the father. And again as between the non-Nair sons and the Nair widow, the latter would take half though the caste wife even if alive will not have taken any share. It is however, on the question of tarwad management and partition, that the Cochin Regulation has very pronounced features. It starts with declaring the joint proprietorship of the karnavan and the junior members. Unlike the Travancore Regulation it prohibits delegation of karnavan's powers (S. 23). It requires the karnavan to keep an inventory of all the moveables and immoveables of the family and to maintain also a correct account of the income and the expenditure, subject to inspection by junior members, thus approximating his position to that of a trustee. It gives him as a solatium possibly an absolute right to 25 per cent. of the net income (a term undefined) subject to a maximum of Rs. 900. Except with the written consent of all the major members, wherever possible, (without these words, the situation would have been impossible) no sale of tarwad moveables or immoveables, no lease for more than 6 years, no mortgage, pledge or hypothecation of such property or discharge of mortgage is valid. Mr. Thampan's Bill goes one step further and requires, even in the case of debts, the written consent of all the major members. These proposals will be practicable only on the supposition that all the members of the family are actuated by the sole consideration of the benefit of the tarwad, whereas, as a matter of fact, the conduct of junior members as well as that of the karnavan is swayed so often by totally different considerations. With tarwads broken up into tavazhis by the rule as to partition and with the vague words "wherever possible," (which however destroys the value of the check and

introduces considerable scope for perjury which it must have been the intention of the framers of the Act to avoid), the Cochin Regulation may be feasible. Without that, ever so great the impending necessity, it would be in the power of any member mischievously inclined to ruin the family, not to speak of the difficulty, with the best of intentions of procuring the consent of all the junior members having regard to the numerical strength of many tarwads and the not improbable contingency of the members of the family being distributed over the whole of the Presidency or even of India. The approval of a family council composed of the natural heads of the tavazhis is a more feasible proposition and we think is the most hopeful one if families have to be maintained in anything like the present numerical strength. It may be worthy of consideration whether the seniormost ladies also should not be added, for their interest in the tarwad may in 9 cases out of ten be counted on as real and genuine. We cannot think of anything more fatuous than the rule in the Cochin Regulation that all the members of the family should be parties to the suit concerning the family. Under that rule, however *bona fide* the litigation and however efficiently it might have been conducted the failure to make any unconsidered infant a party to the litigation would open up the whole question. In this matter, commonsense is, we think, on the side of the Travancore Legislation. The proposed body as we said is likely to present the most effective check on the vagaries and the frauds of the karnavan. A combination between the heads of various tavazhis is a very unlikely event.

Another very important provision of the Cochin Regulation is that which enables the bulk of the major members of a tavazhi to enforce partition after the life-time of the ancestress or with her consent. The partition is to be *per stirpes* the shares being however calculated *per capita*. In the case of adoption, as in the case of alienations the written consent of all the members is insisted upon. This may be unexceptionable as adoption is not an indispensable matter.

Mr. Thampan is opposed to partition because apparently the experience gathered in the working of the Cochin Regulation which allows partition is not sufficiently encouraging and in addition, compulsory partition however welcome to people wedded to individualistic ideas, must beyond doubt lead to disintegration of families and there seems to be a certain amount of

revulsion of feeling in Cochin against partition. But nobody can completely stem the tide of those ideas and all these enactments, whether they provide for tavazhi partition or for efficient management and equitable distribution of the benefits, can only serve as temporary half-way house measures putting off the evil day, if evil day it is, of individual partition and Makkathayam. They are useful in that they may make the transition easy and life comparatively tolerable in the meanwhile. He would have the theory of trust started by the Cochin Regulation worked out to the full. He would have the written consent of all the major members for all alienations except leases for one year in the case of Verumpatton lands and in the case of kanom lands for 12 years (moveables not excepted) and for all debts. He would insist upon all the members being made parties to suits. He would have no delegation except with the consent of majority of members. He would have the karnavan keep accounts and inventories and he would make him liable for gross negligence as well as wilful default. Out of the net income, that is to say, the gross income *minus* the outgoings for rent, assessment and interest the karnavan is to take five per cent. absolutely for himself. Seventy-five per cent. is to be used for maintenance and the balance is to be invested in specified investments. The whole trouble about these proposals is as we have had occasion to observe already that they don't take note of the normal type. They don't sufficiently take note of the fact that all the tarwads are not rich so as to afford the luxury of an account and an inventory, that indebtedness and quarrelsomeness is the rule and not the exception, that the remuneration of five per cent. on the net income is much too small an inducement to karnavans in most cases, to undertake and carry out faithfully the trust, in short that you cannot convert the family system which is the ordinary mode of life in the west coast into one of perpetual trust. It is the pomp and circumstance, the irresponsibility and the dignity attaching to it that reconciles people to the position of karnavan. A receivership on 5 per cent of the net income with accountability and litigation will be not sufficiently tempting in most cases and far from families being kept intact—disintegration must result from legislation of this sort. Our own idea is that checks like those imposed in the Travancore legislation of the family council with a clear declaration that the karnavan's position is like that of the manager of a

Hindu family and with a power for the karnavan or the junior members to have recourse to Court by a summary proceeding for sanction or for prohibition of alienations upon notice to the heads of tavazhis by way of appeal from the family Council and in the case of a single branch to the other major members must be sufficient protection for junior members. Prevailing ideas as to right of maintenance in Madras cannot be said to err on the side of illiberalness and as a matter of fact are serving as powerful levers to bring erring karnavans to a sense of their responsibility. We are not able to appreciate the wisdom or propriety of the rule that 75 per cent of the net income should be used for maintenance: what is to become of the balance if any portion is unutilised or is it intended that it should be equally distributed ? Such a thing is possible only if separate residence also is contemplated. A scheme of distribution of an aliquot share of income to non-resident members would work a hardship on the resident members. In commenting upon the Cochin and the Travancore Regulations, we have sufficiently indicated our objection to Mr. Thampan's Bill also in so far as it attempts to define the duties and powers of the karnavan to define the investments permitted to the karnavan. It is equally if not more objectionable to prescribe the order and the things on which the karnavan is required and entitled to spend. It is impossible for any legislation to comprehensively enumerate the various heads of necessity and appraise their comparative importance. The question must depend largely upon the circumstances of each case. In the present state of the law it is not even necessary to indicate that education and medical expenses are included in maintenance. The enumeration of these might hamper the discretion of the Courts when other items came up for discussion.

B. SITARAMA RAO.

JOTTINGS AND CUTTINGS.

Juvenile Courts.—But the matter of the Report well deserves the setting which it has received. The Juvenile Court is by no means on the footing of an ordinary Criminal Court—

"The idea of treating the young offender as a criminal is far from the mind of the average Magistrate, and while he seeks to give him a fair trial, he looks not so much to the task of punishing as to that of befriending and helping him to regain his footing. It may safely be said that many of the Juvenile Courts are doing social work of the greatest value."

To ascertain the actual working of these Courts a circular was sent last March to all Courts of Summary Jurisdiction, except those in London (where the conditions were sufficiently known) asking for information on a number of points, such as the place where the Juvenile Court is held, how often it sits, the organisation of the Court, and so on. In the majority of the Divisions (573) the Juvenile Court is held in the ordinary Court, with arrangements for separating the cases. In 380 the Juvenile Court is held on the same premises, but in a different room. Liverpool appears to have been the first to provide a Juvenile Court specially constructed for the purpose, and a photograph of the interior is reproduced in the Report. But for the statistics on the various questions reference must be made to the Report itself. One matter to which attention is called is the need for a medical examination of young people who are brought before the Court. Apart from the importance of discovering physical and mental defects, there is, unfortunately, an additional reason in the prevalence of *encephalitis lethargica,* and the remarkably moral changes it produces. As to the efficacy of birching there is sharp diversity of opinion, but apparently it is not, generally speaking, a deterrent, a conclusion which probably is correct ; and perhaps the same may be said of all corporal punishments.

—*The Law Journal,* August 8, 1925, p. 716.